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NO. 88-1201

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DARREL G. HARDEN,

Petitioner,

vs.

C.W. BERT, D.M. EGLE, J.E. FRANCIS, M.C. JISCHKE, T.J. LOVE, W.R. UPTHEGROVE, Individually, and THE BOARD OF REGENTS OF THE UNIVERSTIY OF OKLAHOMA, a subdivision of the State of Oklahoma,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner filed a civil rights case in the District Court for the Western District of Oklahoma on February 28, 1986. Respondents filed their Motion to Dismiss on March 21, 1986, and the District Court granted the Motion, in part, on May 5, 1986.

Petitioner requested leave to file his First Amended Complaint on May 14, 1986, which was denied as moot, because on August 5, 1986, Petitioner requested leave to file his Second Amended Complaint which was granted. The Second Amended Complaint was twelve (12) pages long, and the allegations set out therein are summarized below.

Petitioner claimed that he was not promoted in 1973, and that the reason given him for his lack of promotion was deceitful. He also complained that stu-

dents for which he was an advisor were the subject of discriminatory discouragement. He did not claim that race, religion, sex, age or national origin was the animating force behind this alleged discriminatory discouragement.

Petitioner also claimed that his work load was high, and that the subjects that he was asked to teach were unpopular. He conceded that these problems were remedied, at least in part, as a result of his complaining to the university president. He also complained that he received poor evaluations in his teaching and research.

In successive paragraphs of Petitioner's Complaint, he discusses his grade dispute which was "worked out to the satisfaction of the Plaintiff." He asserted that he was deprived of research facilities which, according to

him, were normally and customarily provided to engineering professors.

Petitioner asserted that in 1963, his pay increases began dropping below other staff members. He claimed that he was the lowest paid faculty member in the College of Engineering. Petitioner complained that no action was taken with regard to a requested sabbatical leave.

Petitioner alleged in another paragraph of his Complaint that methods employed by some of the Respondents in connection with the investigation into a sexual harassment complaint were in violation of the rules set forth in the faculty handbook. He claimed that he suffered embarrassment as a result.

Professor Harden complained that the procedures employed in regard to the promotion consideration in 1973 were improper. Then, he complained that his

methods and approach were not appreciated by his colleagues.

Petitioner complained that the Respondents conspired to "constructively discharge him from his tenured position at the University of Oklahoma."

Professor Harden continued in his Complaint to assert that the State of Oklahoma, though normally immune from actions in federal court, is nevertheless liable in this case because the University purchased insurance.

Petitioner sought several millions of dollars in damages in addition to injunctive relief.

Respondents filed multiple Motions to Dismiss on September 19, 1986. The trial court entered an order on February 23, 1987, granting the Defendants' multiple Motions to Dismiss. On September 6, 1988, the United States Court of

Appeals for the Tenth Circuit filed an order affirming the judgment of the District Court on the following bases:

1. That immunity under the Eleventh Amendment was not waived to the extent of liability insurance procured by the University;

2. That facts necessary to support the award of injunctive relief had not been plead;

3. That claims under 42 U.S.C. Sections 1983, 1985, and 1986, if any, were barred by the statute of limitations; and

4. That Petitioner's allegations that the Defendants conspired to deprive him of due process and equal protection failed to state a claim upon which relief could be granted.

On October 20, 1988, the Court of Appeals entered an order denying Appellant's Petition for Re-Hearing en banc.

SUMMARY OF ARGUMENT

The issues involved in this case do not rise to the level warranting issuance of a Writ of Certiorari. First, the central issue in this case is whether Petitioner's action is barred by the statute of limitations. The Tenth Circuit, applying state laws, rendered a decision consistent with the laws of the State of Oklahoma.

The Court of Appeals decision did not conflict with decisions of other federal courts of appeals on the same matters. Nor did the Circuit's decision involve important questions of federal law. The Tenth Circuit did not decide a federal question in a way in conflict with applicable decisions of the Supreme Court.

ARGUMENT

PROPOSITION I

THE COURT OF APPEALS DECISION IS CONSISTENT WITH THE LAWS OF THE STATE OF OKLAHOMA.

Petitioner first urges this Court to issue a Writ of Certiorari because the Court of Appeals' decision finding that this action is barred by the statute of limitations is contrary to the laws of the State of Oklahoma. Without question, state law regarding the statute of limitations is to be applied. It is also agreed that the two year statute of limitations is proper. However, Petitioner suggests that the Statute should have been tolled.

According to Petitioner, there exists a fiduciary relationship or a relationship of trust between the parties which excuses the Petitioner from exercising due diligence in discovering

the existence of his cause of action. The Oklahoma cases on which Petitioner relies for this proposition are clearly distinguishable.

First, according to Farmers State Bank of Ada v. Keen, 66 Okl. 62, 167 P. 207 (Okla. 1917), in cases where a relationship of trust or a fiduciary relationship between the parties exists, there is an exception to the general rule that the limitations period in cases of fraud begins when the fraud is committed or when the defrauded person with ordinary diligence might have discovered it. The court in Farmers announced that the principal in a transaction that is a matter of public record has a right to rely upon the fidelity or truthfulness of his agent and his duty to disclose the true state of fact. In such a situation, ordinary diligence

does not require the principal to search public records to discern the trust relationship has been abused. Thus, the principal in such a situation should not be charged with constructive discovery of the fraud even though facts which would have revealed the fraud are matters of the public record. The rule is set forth in dicta and was unrelated to the facts in Farmers.

In Liberty National Bank of Weatherford v. Lewis, 172 Okl. 103, 44 P.2d 127 (Okla. 1935), a bank acted as the plaintiff's agent for the collection of sums owed on a note owned by the plaintiff. Though the bank received final payment on the note, payment was not credited to plaintiff's account. Also, in response to repeated inquiries, plaintiff was told that payment was not received, thereby causing plaintiff/

owner to postpone filing an action against the bank for recovery of the amount collected. The Court held that since there existed between the parties a fiduciary relationship, the owner was not charged with constructive knowledge of the fraud with regard to the running of the statute of limitations.

United Fidelity Life Insurance Company v. Law Firm of Best, Sharp, Thomas & Glass, 624 F.2d 145 (10th Cir. 1980) involved an attorney malpractice action in which attorneys plead the statute of limitations as a defense. The Court of Appeals held that a fiduciary relationship between the attorneys and their clients existed and that the attorneys had a duty to keep their clients apprised of the course of litigation. Thus, the trial court was correct in holding that there was will-

ful concealment by the attorneys which tolled the running of the statute of limitations where the attorneys failed to inform their clients that a judgment was entered against them until three months after its entry. Plaintiffs brought their action more than two years after the judgment was entered, but less than two years after they were informed of its entry.

In the cases cited by Petitioner, tolling of the statute was proper where the defendants were in a fiduciary position and concealed facts which prevented the plaintiffs from knowing they had a cause of action. In this case, Professor Harden offers no authority for his contention that the university occupies the position of fiduciary. Moreover, the Court of Appeals considered Petitioner's

arguments and found that in this case, "there was no concealment as to the existence of the cause of action." Upon examination of the record, the Court found that when the University denied his promotion in 1973, Mr. Harden was aware of all the necessary facts which constituted his claims for deprivation of due process and conspiracy, and that reasonable inquiry would have led to the discovery of the claim.

It was not necessary for the Court of Appeals to state that no fiduciary relationship between Professor Harden and the University existed as Petitioner suggests. It is apparent that the Court of Appeals considered Petitioner's arguments and rejected them because they were inapplicable to the facts in this case. Instead, the Court of Appeals rendered a decision con-

sistent with the laws of the State of Oklahoma. That is, that the limitations period is not tolled unless the Plaintiff could show "concealment of facts which would prevent him from knowing that he had a cause of action." Clulow v. Oklahoma, 800 F.2d 1291, 1301 (10th Cir. 1983). Moreover, failure to exercise due diligence in discovering the claims will prevent the limitations period from being tolled where a reasonable inquiry would have led to the discovery of the claim. Sade v. Northern Natural Gas Co., 483 F.2d 230, 235 (10th Cir. 1973); Knudson v. Weeks, 394 F.Supp. 963, 974 (W.D. Okla. 1975); In Re: Woodward, 549 P.2d 1207, 1209 (Okla. 1976); Wills v. Black & West Architects, 344 P.2d 581, 584 (Okla. 1959).

PROPOSITION II

IT IS NOT NECESSARY FOR THE DISPOSITION OF THIS CASE FOR THIS COURT TO ADDRESS WHETHER ACADEMIC FREEDOM IS A CONSTITUTIONALLY PROTECTED RIGHT.

Petitioner next contends that the Tenth Circuit disregarded his allegations of the violation of his right to academic freedom, and asserts that Certiorari should be granted to clarify the issue of whether academic freedom is a constitutionally protected right for purposes of 42 U.S.C. Sections 1983 and 1985 (3).

The Tenth Circuit ruled that Respondents were absolutely immune in their individual capacities from suit for conspiracy seeking money damages and that allegations necessary for a personal capacity suit under Sections 1983 and 1985 were absent.

According to Gomez v. Toledo, 446 U.S. 635, 640 (1980), the Plaintiff must allege that some person deprived him of a federal right and that the person acted under color of state law. Determining that Petitioner's Complaint lacked indications that the Respondents acted in their individual capacities under color of state law, it was not necessary that the Court determine whether Petitioner set forth facts showing the deprivation of a federal right. However, the Court determined that Professor Harden's claims regarding poor working conditions, professional criticism and denial of raises, privileges and promotions did not rise to the level of fundamentally protected liberty or property rights.

Even if it is assumed that Petitioner asserted that some person de-

prived him of his academic freedom, his personal capacity suit under 1983 would fail because, as the Tenth Circuit determined, one of the essential allegations would still be lacking from the Complaint, i.e., indications that the Defendants acted in their individual capacities under color of state law. Thus, Petitioner asks this Court to address a constitutional question that is not essential to the disposition of the case.

Deciding this question posed by the Petitioner would be contrary to the policy of the United States Supreme Court to avoid unnecessary ajudication of federal constitutional questions. City of Mesquite v. Aladdin Castle, Inc., 455 U.S. 283 (1982).

PROPOSITION III

PETITIONER FAILS TO ASSERT FACTS WHICH WOULD WARRANT THIS COURT'S CONSIDERATION REGARDING PETITIONER'S ALLEGED DENIAL OF PROCEDURAL DUE PROCESS.

Petitioner contends that tenure is a property right and that Respondents deprived him of his constitutional right when they allegedly "abrogated" his tenure without due process. Assuming tenure is a federally protected property right, Petitioner has not stated facts sufficient to show any infringement of that right.

It is not alleged that Harden was discharged from his position at the University. Nor was he constructively discharged. Constructive discharge occurs only when an employer deliberately makes or allows the employee's working conditions to become so intolerable that the employee has no

choice but to quit. Moreover, the employer's actions must be intended by the employer as an effort to force the employee to quit. Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975), cert. denied, 423 U.S. 825 (1975), Irving v. Dubuque Packing Co., 689 F.2d 170, 172 (10th Cir. 1982).

Petitioner did not quit. In fact, he is still employed by the University. Thus, he has not been actually or constructively deprived of his tenure. If there is no deprivation of a constitutionally protected property or liberty right, there can be no question for this Court to consider regarding the deprivation without due process of that right. Thus, Petitioner fails to assert facts which would warrant this Court's consideration regarding his allegations of Fourteenth Amendment violations.

PROPOSITION IV

PETITIONER FAILS TO ASSERT FACTS WHICH WOULD WARRANT THIS COURT'S CONSIDERATION REGARDING ALLEGED DISCRIMINATION.

The Court of Appeals found that the Complaint was lacking in any allegations that Professor Harden was the subject of some invidious class based discrimination of a type envisioned by the framers of the Civil Rights Act of 1871, which allegations would be necessary to establish a conspiracy under 1985. In order to support an action under 1985 (3), "the plaintiff must be a member of a statutorily protected class, and the actions taken by the defendant must stem from plaintiff's membership in the class. Silkwood v. Kerr McGee Corp., 637 F.2d 743, 746 (10th Cir. 1980), cert. denied, 454 U.S. 833 (1981). A private feud is not within the intended scope of the Act's coverage. Silkwood, 637 F.2d at 748.

First, assuming that tenured teachers comprise a class to be afforded protection from invidious class based discrimination, Petitioner's Complaint wholly failed to assert any facts which could be construed as showing that the actions were taken because he was a member of the class of tenured teachers, or that Respondents harbored a general prejudice that transcended the private disputes between the parties. Thus, Professor Harden fails to state facts sufficient to warrant this Court's examination of the allegations regarding class based discrimination.

The Court of Appeals did not state or imply that dismissal of Professor Harden's claims under 1985 (3) was proper because his claims were for deprivation of rights created by Title 7 as Professor Harden asserts. The opin-

ion clearly states that dismissal of conspiracy claims under 1985 (3) is proper because the Complaint was devoid of allegations necessary to state a cause of action under that federal statute. The Court merely includes an additional possibility for the propriety of the dismissal. This extra precaution by the Court of Appeals is clearly warranted, given the shotgun approach of allegations set forth in Petitioner's Complaint. Thus, since it is not essential to the disposition of this case, this Court should not address the Tenth Circuit interpretation of Great American Federal Savings & Loan Assoc. v. Novotny, 442 U.S. 366 (1979), as Petitioner requests.

PROPOSITION V

THE TENTH CIRCUIT DECIDED THE ISSUE OF ELEVENTH AMENDMENT IMMUNITY IN ACCORD WITH APPLICABLE DECISIONS OF COURTS OF APPEALS IN OTHER CIRCUITS.

Petitioner asserts that if the Eleventh Circuit had heard his appeal, the Respondents would have been denied Eleventh Amendment immunity. Petitioner bases his conclusion on one case, Travelers Indemnity Co. v. School Board of Dade County, 666 F.2d 505 (11th Cir. 1982), cert. denied, 549 U.S. 834 (1982).

In Travelers, a school board claimed Eleventh Amendment immunity from suit by a performance bond surety on the basis that the money to satisfy the judgment might be derived from the State by way of a bond issue for construction of school buildings. The Eleventh Circuit denied the school board Eleventh

Amendment protection from suit on the basis that the County Board of Education, under Florida law, was not ordinarily considered a part of the State for Eleventh Amendment purposes, and where judgment against the board might be satisfied with funds not in any way derived from the State of Florida. Travelers, 666 F.2d at 509.

Given the facts in Travelers, when the Court states:

> The Eleventh Amendment protection is available only if satisfaction of judgment against the state "agency" must under all circumstances be paid out of state funds,

it clearly refers to a judgment against a governmental entity not considered to be part of the state for Eleventh Amendment purposes. In this case, it is undisputed that the Respondents, the Board of Regents, and six individuals in their official capacities, are con-

sidered as an arm of the State. Article XIII, Section 8 of the Oklahoma Constitution, and Gay Activists Alliance v. Board of Regents, 638 P.2d 116, 123 (Okla. 1981). Thus, Respondents in this case are immune from liability in a suit which seeks damages in federal court. Edelman v. Jordan, 415 U.S. 651, 673 (1974). Tenth Circuit judgment on this issue is in accord with judgments of other federal courts of appeals, notwithstanding Travelers.

PROPOSITION VI

BECAUSE THE TENTH CIRCUIT'S APPLICATION OF FED. R. CIV. P. RULE 12 (b) (6) AND DENIAL OF INJUNCTIVE RELIEF DO NOT INVOLVE DECIDING A FEDERAL QUESTION AND BECAUSE THE COURT HAS NOT DEPARTED OR SANCTIONED THE DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, THIS COURT'S POWER OF SUPERVISION IS NOT NECESSARY.

The District Court and the Court of Appeals both recognized that the Petitioner alleged no facts from which it could be inferred that he would suffer irreparable harm absent the issuance of an injunction or that there was not adequate remedy at law. Both elements are essential in order for an injunction to be warranted in federal court. Weinberger v. Romero-Arcello, 10456 U.S. 305 (1982), U.S. v. American Friends Service Committee, 419 U.S. 7 (1974), O'Shea v. Littleton, 414 U.S. 488 (1974). The Petitioner has pointed out

no specific allegations in his Complaint which would fulfill the requirements so firmly set and recognized by the Court of Appeals.

Moreover, Petitioner does not specify what he wishes to be enjoined. As the Court of Appeals instructed, "obey the law" injunctions or injunctions against discrimination in broad terms are impermissible. Fed. R. Civ. P. 65 (f); Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 898 (5th Cir.), cert. denied, 439 U.S. 835 (1978).

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should not issue in this action.

Respectfully submitted,

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